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In The

Supreme Court of the United States

October Term, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

v.

KEITH M. SCOTT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to the searches as a condition of his parole?

2. Does the exclusionary rule apply to parole revocation proceedings?

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STATEMENT OF THE CASE

In addition to the facts set forth by petitioner, the Pennsylvania Board of Probation and Parole ("Board"), the following are material to consideration of the questions presented.

Respondent, Keith Scott ("Scott"), became eligible for parole consideration in 1993, having then served the ten year minimum portion of his sentence of ten to twenty years imprisonment. 61 Pa. Cons. Stat. Ann. § 331.21 (1964). After an investigation and consideration of the circumstances of his offense and his character and history (61 Pa. Cons. Stat. Ann. § 331.19 (1964)), parole was granted on August 25, 1993. J.A. 2a. However, release on parole was subject to his acknowledging that he agreed to follow the parole conditions set forth in Form PBPP-11, and any stated special conditions. J.A. 2a; 37 Pa. Code §§ 65.6 and 67.3. Among the conditions was an agreement to searches of his person and property by parole agents. Pet. App. 2a. On August 31, 1993, Scott signed the Conditions Governing Parole/Reparole form and was then released from prison on parole. J.A. 4a-8a; Pet. App. 30a n.3.

On February 4, 1994, a warrant to commit and detain Scott for violations of parole was issued by the Board (J.A. 9a) and he was arrested on that date in a diner by three parole officers, including his parole agent, Floyd Gallo. Pet. App. 2a. After seizing the key to Scott's home from him, the agents went to his house. J.A. 80a. Scott lived at home with his mother and stepfather, Mr. and Mrs. McDaniel. Pet. App. 2a. Only after being told by the agents that they were going to search Scott's room did

Mrs. McDaniel acquiesce and direct them there. Nothing was found in the search of his room, but during a search of an adjacent room, unloaded firearms were found. Scott was charged with possession of a firearm, a violation of parole. Pet. App. 3a.

On March 30, 1994, a hearing was held concerning the alleged violations of parole. J.A. 14a-18a. Scott's parole agent, Gallo, represented the Board and acted as prosecutor. His responsibilities included cross-examining Scott and his witnesses and presenting closing argument in support of a finding that the parole violations had been established. J.A. 94a-104a; 129a-131a.[1]

Agent Mundro testified at the hearing concerning the search of Scott's home. At the time of the search there was no regulation or statute in Pennsylvania concerning the authority or circumstances for parole agents to conduct searches of the homes of parolees. Pet. App. 31a. When asked by the hearing examiner what legal guidelines governed the search, the agent responded that the Board could search any parolee's approved residence. Pet. App. 4a.

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[1] One witness, Eric Hahn, called by Gallo to testify concerning certain alleged parole violations, had executed an affidavit which was introduced by the Board. Scott introduced a subsequent affidavit, D-1, "which indicated that his prior affidavit was executed under pressure by parole agents." Pet. App. 20a-21a. Hahn's subsequent affidavit alleged that Agent Gallo had told him and his son to "stretch the truth" and that Gallo had told him he never wanted Scott out of prison. Reproduced Record 103a; 140a. *See* J.A. 43a-45a.

Scott's parole was revoked on the basis of multiple violations, including possession of the firearms found in the search of his home. He was recommitted to serve 36 months in prison before becoming eligible for reparole. Pet. App. 5a. He has not been granted reparole.

Scott appealed to the Commonwealth Court of Pennsylvania. That court reversed and remanded for further proceedings. Pet. App. 39a. The Commonwealth Court concluded that the search of Scott's home violated the Fourth Amendment and that the exclusionary rule was applicable to his revocation hearing. Pet. App. 26a-37a.

The Board sought review in the Pennsylvania Supreme Court, which affirmed the judgment of the Commonwealth Court. The Pennsylvania Supreme Court concluded that there was no reasonable suspicion for the search of Scott's home by the parole officers. Pet. App. 10a. That conclusion has not been challenged here, nor was it ever claimed in the state courts that reasonable suspicion supported the search. The Board's sole claim for sustaining the validity of the search in the Pennsylvania courts and in its petition for a writ of certiorari to this Court was that Scott had consented to the search by signing the Conditions of Parole/Reparole form. In pertinent part, this form states:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.
>
> Pet. App. 2a.

The Pennsylvania Supreme Court, relying exclusively on another Pennsylvania Supreme Court decision, construed this standard Pennsylvania parole conditions form as an acknowledgment by the parolee that the Board can, as stated in the form, conduct warrantless searches, but not that it also can conduct searches without reasonable suspicion. Pet. App. 9a-10a. Accordingly, the court held that the Fourth Amendment requires reasonable suspicion for a warrantless search of a parolee's home. Finding no reasonable suspicion for the search of Scott's home by his parole agent, it held that his Fourth Amendment rights were violated. Pet. App. 10a.

The Pennsylvania Supreme Court also concluded that the exclusionary rule should apply to revocation proceedings in those limited circumstances where the searching officer knows or has reason to know of the parolee's status. Pet. App. 14a-17a. It held that "there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a.

This Court granted the Board's petition for a writ of certiorari, limited to its first question of whether the exclusionary rule applies to parole revocation proceedings. In addition, the parties were invited to brief and argue the following question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" 118 S. Ct. 554 (1997).

SUMMARY OF ARGUMENT

1. Certiorari should be dismissed on the question of whether reasonable suspicion is required for the search of a parolee's home when he agrees to such a search as a condition of being released on parole. The search provision which was signed as a condition of parole stated only that it permitted warrantless searches. It did not provide for searches without reasonable suspicion. The record, therefore, does not present the issue.

The Pennsylvania Supreme Court construed the provision in accordance with Pennsylvania law to permit only warrantless searches, and not searches without reasonable suspicion. There is an adequate and independent state ground for the state court's interpretation of a state law administrative provision.

2. Consent to an otherwise unconstitutional parole search imposed as a condition for release from prison on parole is not voluntary. The price in this case for refusing to sign the search provision contained on the parole conditions form was ten more years in prison rather than release on parole. In true consent cases, where there is no coercion, an individual can refuse to consent without suffering substantial adverse consequences from the state.

The attempt to analogize the acceptance of the terms of parole release to plea bargaining fails as a matter of law and logic. The circumstances attendant to the signing of the parole conditions form manifest no form of bargaining, and the "bargaining chips" are all in the hands of the government.

This Court has already decided that the Fourth Amendment does not allow the search of a parolee's home in the absence of reasonable suspicion. The state may not condition receipt of a benefit, like parole, upon acceptance of an unconstitutional search condition. Otherwise, the state, rather than this Court, through the fiction of voluntary consent, would be the final authority on the reasonableness of searches under the Fourth Amendment.

3. The exclusionary rule has been applied in criminal trial proceedings to exclude evidence obtained by police as the result of unconstitutional searches. There is a significant deterrent value in that context given police law enforcement motivation and the lack of meaningful alternative remedies.

In this case parole agents, peace officers with police powers under state law, arrested a parolee for violating his parole conditions and then searched his home for evidence of violations of parole. The agents were performing a core law enforcement function and their primary zone of interest was the enforcement of parole conditions and the detection of violations. There are no meaningful alternative remedies to deter parole agents from conducting unconstitutional searches of the homes of parolees and their families.

The parole revocation proceeding will not be significantly burdened by permitting parolees to contest a search on the basis that there is no reasonable suspicion. The standard is the lowest under the Fourth Amendment, and the parties to the proceedings will only have to

understand and apply this uncomplicated Fourth Amendment concept.

The benefits clearly outweigh the costs of the exclusionary rule within this context. Without the sanction of exclusion, parole agents will be a law unto themselves. With no requirement of a warrant before they search the home of a parolee and his family and no exclusionary rule after the fact, there will be no oversight by a neutral authority. As a practical matter, the Fourth Amendment reasonable suspicion requirement will be a dead letter and millions of parolees and their families will be vulnerable to unlimited governmental intrusions into their homes.

ARGUMENT

I. BECAUSE THE RECORD DOES NOT PRESENT THE ISSUE AND BECAUSE THE DECISION OF THE COURT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND – THAT THE PAROLE CONSENT FORM DOES NOT PERMIT SEARCHES WITHOUT REASONABLE SUSPICION – CERTIORARI SHOULD BE DISMISSED ON THIS QUESTION.

In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court held that a warrantless search of a probationer's home conducted pursuant to a state statutory framework which required reasonable grounds to believe that there was a probation violation did not violate the Fourth Amendment. *Id.*, at 872-73, 880. In granting certiorari, the Court invited the parties to brief the question of whether the Fourth Amendment nevertheless permits searches of a

parolee's home without reasonable suspicion where the parolee accepts parole on the condition he consents to such searches. This question assumes that the Fourth Amendment normally requires reasonable suspicion for a search of a parolee's residence and that the Pennsylvania parole consent form in fact expresses a consent by the parolee to a search without reasonable suspicion. However, because "the record does not fairly present the question that . . . [the Court] granted certiorari to address", *Rogers v. United States*, 118 S. Ct. 673, 677 (1998) (plurality opinion), certiorari should be dismissed as to this question. The parole condition at issue provides in pertinent part:

> "I expressly consent to the search of my person, property and residence without a warrant by agents of the Pennsylvania Board of Probation and Parole."
>
> Pet. App. 2a.

A condition which permits warrantless home searches does not, of course, automatically decide the separate question of what quantum of information the government must possess to justify the search. *See, e.g., Griffin v. Wisconsin, supra* (although no warrant necessary, reasonable grounds required for parolee home search pursuant to state regulation); *Terry v. Ohio*, 392 U.S. 1 (1968) (although no warrant required, police must have reasonable suspicion for stop and frisk); *Carroll v. United States*, 267 U.S. 132 (1925) (although no warrant required, car search only permissible with probable cause). The plain language of the search condition, as drafted by the Board, does not inform the parolee that searches may be made by parole agents without reasonable suspicion.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), even in the absence of any state court guidance, this Court refused to construe a state probation condition to waive Fifth Amendment rights where the purported waiver was not explicitly stated. The condition there required a probationer to be truthful with his probation officer "in all matters." *Id.*, at 422. "Without the benefit of an authoritative state-court construction of the condition, we are hesitant to read into the truthfulness requirement an obligation that Murphy refrain from raising legitimate objections to furnishing information that might lead to his conviction for another crime." *Id.*, at 437.

Here, too, there is no justification for reading into Scott's parole condition an additional provision requiring him to waive a constitutional right. Consistent with this Court's practice of "avoiding the unnecessary or premature adjudication" of constitutional issues, *Rogers v. United States*, 118 S. Ct. 673, 676 (1998) (plurality opinion), certiorari should be dismissed.

Certiorari should also be dismissed because the interpretation of this state regulatory provision is within the sole province of the Pennsylvania courts, and here, unlike *Murphy*, the state supreme court did construe the state law provision. The Pennsylvania Supreme Court looked only to its decision in *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997), to resolve the question of the construction of the parole search provision. Pet. App. 7a. It followed and quoted *Williams*:

> [T]he parolee's signature acts as acknowledgment that the parole officer has a right to conduct reasonable searches of his residence listed

> in the parole agreement without a warrant. Op. [*Williams*] at ___, 692 A.2d at 1036.
>
> * * *
>
> We went on to say that a search will be deemed reasonable if . . . the parole officer had a reasonable suspicion.

Pet. App. 9a-10a.

Thus, the Pennsylvania Supreme Court relied exclusively on Pennsylvania law to construe the meaning of this state law parole regulation. The Board does not dispute that the Pennsylvania Supreme Court's construction of the search condition provision was an independent state law interpretation. To the contrary, it complains only that the Pennsylvania Supreme Court "distorts the plain meaning of the provision, . . . [and] fails to afford the deference due those who administer a vital part of the State's penological system." Brief for Petitioner 23. The Board thus loses sight of what this Court said in *Griffin*. "Whether or not we would choose to interpret a similarly worded federal regulation in that fashion, we are bound by the state court's interpretation, which is relevant to our constitutional analysis only insofar as it fixes the meaning of the regulation." *Griffin*, 483 U.S. at 875. Indeed, "it would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

In addition to *Commonwealth v. Williams, supra*,[2] the decision below is fully consistent with previous rulings of

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[2] *Williams* looked to Fourth Amendment considerations, Pennsylvania law and other states for guidance before deciding

the Pennsylvania Supreme Court interpreting the state law of consent. As a matter of state law, the Pennsylvania Supreme Court requires that "in order for consent to an otherwise illegal search to be valid, the consent must be unequivocal, specific, and voluntary." *Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994). The parole condition search provision neither specifically nor unequivocally allows searches without reasonable suspicion. Indeed, there is no suggestion whatsoever in the form that such searches would be permitted. And, as a matter of statutory construction, the Pennsylvania Supreme Court has long held that it will not "supply omissions in a statute." *E.g., Panik v. Didra*, 88 A.2d 730, 733 (Pa. 1952); *Kusza v. Maximonis*, 70 A.2d 329, 331 (Pa. 1950).

Given Pennsylvania's construction of its own state provision on state law grounds, there is an adequate and independent state ground for its decision. *Michigan v. Long*, 463 U.S. 1032 (1983). Coupled with the fact that the parole condition does not provide for suspicionless searches, this case is a particularly poor vehicle to answer the question of whether a parolee can consent to searches

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on its state law interpretation of the consent provision, 692 A.2d at 1036-37, and, to the extent that the Pennsylvania Supreme Court in *Williams* considered both Fourth Amendment and state constitutional principles on some of the claims in that case, it ultimately made an independent analysis under Art. I, Sec. 8 of the Pennsylvania Constitution. 692 A.2d at 1038-39. Thus, even if, as suggested by the Brief for the United States at 24 n.6, that *Williams* is somehow relevant to the nature of the decision made in this case by the Pennsylvania Supreme Court, there still exists an independent state law basis for the decision. Of course, the judgment in *Williams* is not before this Court.

without reasonable suspicion.[3] Certiorari should be dismissed as to this question.

II. WHEN RELEASE FROM PRISON ON PAROLE IS DEPENDENT ON AGREEING TO AN OTHERWISE UNCONSTITUTIONAL SEARCH CONDITION, ACCEPTANCE DOES NOT CONSTITUTE VOLUNTARY CONSENT

Assuming that Scott's parole condition purports to authorize searches without reasonable suspicion, this Court should hold that Scott did not voluntarily consent to that parole condition. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), a case not discussed by the Board, provides the framework for analysis of the issue of consent. *See, e.g., Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996); *United States v. Mendenhall*, 466 U.S. 544, 557-58 (1980).

The Board and amici argue that the circumstances under which Scott signed the parole search consent form were not coercive in a constitutional sense and that his choice to "consent" to searches without a warrant and without reasonable suspicion is one that is tolerated by the Constitution. There are fundamental flaws in these

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[3] The situation will not arise again in Pennsylvania regardless of this Court's decision. Subsequent to the search in this case, the legislature enacted a provision permitting parole agent searches "in accordance with the provisions of this section." 61 Pa. Cons. Stat. Ann. § 331.27a.(b) (Supp. 1997). The Act further provides that reasonable suspicion is required for the search of a parolee's home, and has been so construed by the Pennsylvania Supreme Court. 61 Pa. Cons. Stat. Ann. § 331.27a.(d)(2), (g) (Supp. 1997); *Commonwealth v. Williams*, 692 A.2d 1031, 1035 n.9 (1997).

arguments. First, under the established test for determining whether consent is voluntary, articulated in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), there can be no finding that the decision to sign the form was the result of an "essentially free and unconstrained choice." *Id.*, at 225. For the potential parolee, a refusal to sign means years more in custody rather than freedom. In related contexts, this Court has not accepted the fiction of consent. When the government conditions receipt of a benefit on an agreement to surrender constitutional rights, this Court has consistently found that the situtation is coercive. Second, the attempt to analogize the acceptance of the terms of parole release to plea bargaining fails as a matter of law and logic. We will show that the circumstances attendant to the signing of the parole conditions form involve no bargaining, and that the "bargaining chips" are all in the hands of the government. Third, the Court has determined the legitimacy of an invasion of privacy mandated by the government under the Fourth Amendment's "reasonableness" test, an inquiry that requires the applicable balancing of interests. Thus, the government may condition certain benefits or entitlement on the reciprocal power to search only if, considering all of the factors, the search is reasonable. A reasonableness test here would require that a search of a parolee's residence be supported by reasonable suspicion.

A. The Schneckloth Voluntariness Test: Where Saying No To The Unconstitutional Parole Search Condition Would Result In Ten More Years In Prison, Acceptance Does Not Constitute Voluntary Consent.

The Government "has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). This Court observed that the question is one of whether there is an "essentially free and unconstrained choice." *Id.*, at 225. Considering the totality of the circumstances, the test is whether "a search was in fact 'voluntary' or was the product of coercion, express or implied." *Id.*, at 227. This Court emphasized in *Schneckloth* that the defendant there was not in custody (*Id.*, at 248), and "that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Id.*, at 241 n.29.

Further, in assessing the totality of the circumstances, consideration must be given to "the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229. It is clear that when liberty is at stake, the pressures on an individual making a decision are particularly powerful. Thus, in *Minnesota v. Murphy*, 465 U.S. 420 (1984), this Court had little difficulty concluding that if a probation condition required waiver of the privilege against self-incrimination, the state "would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." *Id.*, at 435 (footnote omitted). In

United States v. Watson, 423 U.S. 411 (1976), this Court determined that an individual who had just been arrested had voluntarily consented to a search of his car. *Id.*, at 425. The defendant was "on a public street, not in the confines of a police station," *id.*, at 424, and "[t]here were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment." *Id.*, at 424.

There was nothing subtle about the coercion inherent in Scott's situation. He had been in prison for ten years when he became eligible under Pennsylvania law to apply for parole on his ten to twenty year sentence. 61 Pa. Cons. Stat. Ann. § 331.21 (1964). The decision to grant or deny parole is discretionary after an application is filed. 61 Pa. Cons. Stat. Ann. § 331.22 (1964). *See, e.g., Weaver v. Pennsylvania Board of Probation and Parole*, 688 A.2d 766 (Pa. Commw. Ct. 1997) (en banc). In this case, after the appropriate investigation, 61 Pa. Cons. Stat. Ann. § 331.19 (1964), Scott was approved for parole on August 25, 1993, with an actual release date of September 1, 1993. J.A. 2a-3a. As a potential parolee, Scott would not attain the actual status of parolee (and his release from prison) unless he signed the form containing the conditions of parole, including the search condition at issue here. 37 Pa. Code §§ 65.6 and 67.3. *See Shaw v. Pennsylvania Board of Probation and Parole*, 671 A.2d 290, 292 (Pa. Commw. Ct. 1996), *appeal denied*, 690 A.2d 1165 (Pa. 1997); *Johnson v. Commonwealth, Pennsylvania Board of Probation and Parole*, 532 A.2d 50, 52 (Pa. Commw. Ct. 1987).

Thus, the price of saying no to the government's search condition was ten more years of imprisonment for Scott. For good reason, Professor LaFave has concluded

that "to speak of consent in this context is to resort to a manifest fiction." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b) at 764 (3d Ed. 1996).[4] In true consent to search cases, where this Court has found that the Government met its burden of showing an absence of coercion, *see, e.g., United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980); *United States v. Watson*, 423 U.S. 411, 424-25 (1976), there is the free and unconstrained choice to say no to the government without adverse consequences from the government directly following as a result of that decision.[5]

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[4] Some courts have reached the same conclusion. *See, e.g., United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155 (W.D.N.Y. 1975); *Dearth II v. State*, 390 So.2d 108 (Fla. Dist. Ct. App. 1980); *Tamez v. State*, 534 S.W. 2d 686, 691-92 (Tex. 1976).

[5] In less inherently coercive circumstances, federal circuit courts have correctly refused to indulge the fiction that an individual voluntarily consented to a government search when a search was required as a condition of engaging in an activity and the person still chose to do the activity. *E.g., McGann v. Northeast Illinois Regional Commuter R.R. Corp.*, 8 F.3d 1174, 1179-1181 (7th Cir. 1993) (parking in government garage with notice that cars parked there are subject to search); *Blackburn v. Snow*, 771 F.2d 556, 567-69 (1st Cir. 1985) (entering prison to visit relative after signing required form consenting to strip search); *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974) (choosing to board airplane with notice that magnetometer search necessary to do so). In each of these cases the court held that whether the search complied with the Fourth Amendment should be judged on the reasonableness of the government's actions. Likewise, this Court has noted that searches at airports and entrances to courts are reasonable, and therefore constitutional, because of the public safety concerns involved, not on a theory that there is voluntary consent. *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997). *See also National Treasury Employees v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

Even where freedom is not at stake, and the individual is threatened only with adverse economic consequences, this Court has recognized the inherent coercion and a lack of voluntariness associated with the purported consent.

Eighty years ago, finding a Commerce Clause violation, the Court rejected the argument that a corporation's application to a government agency for a needed certificate was "voluntary," and that therefore there could be no complaint about the fee charged for the certificate which was found by this Court to be unconstitutional. *Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67, 69 (1918). "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . " *Id.*, at 70.

Likewise, in *Garrity v. New Jersey*, 385 U.S. 493 (1967), where a police officer answered questions after he was threatened with losing his job if he did not answer, the Court held that incriminating answers were obtained in violation of the officer's constitutional right against self-incrimination. *Id.*, at 498-500. "We think the statement was infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id.*, at 498-99 (footnotes omitted). This Court has consistently held that "a waiver secured under threat of substantial economic sanction cannot be termed voluntary." *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973) (provision which requires independent contractors to waive Fifth Amendment rights in return for having contracts with the government is unconstitutional).

Most recently, this Court found a First Amendment violation where an independent contractor was denied the opportunity to do business with the government because he had refused demands to provide political support. *O'Hare Truck Service, Inc. v. City of Northlake,* 116 S. Ct. 2353, 2358 (1996). ("We see nothing to distinguish this from the coercion exercised in our other unconstitutional conditions cases").

Scott's choice to sign the parole search condition was not made in the absence of governmental coercion.

B. There Is No Bargaining Process – It is Take It (The Unconstitutional Search Condition) or Leave It (And Remain In Prison)

Amici urge this Court to find voluntariness here by asserting that the signed Conditions of Parole form is no different than a defendant choosing to accept a guilty plea agreement with the government. *See, e.g.,* Brief for the United States 9-10, 22-28; Brief for the Criminal Justice Legal Foundation 12-13, 18-20. There are several significant features which distinguish the two situations and which demonstrate the inaptness of the analogy.

In the plea bargaining context, there is a "give-and-take negotiation . . . between the prosecution and defense, which arguably possess relatively equal bargaining power." *Bordenkircher v. Hayes,* 434 U.S. 357, 362 (1978). "[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained for exchange." *Ricketts v. Adamson,* 483 U.S. 1, 9 n.5 (1987) (quoting *Mabry v. Johnson,* 467 U.S. 504, 508 (1984)).

A defendant can use his "bargaining chips" to "maximize what he has to sell." *United States v. Mezzanatto,* 513 U.S. 196, 208 (1995). What a defendant has to sell sometimes includes information, and always includes his constitutional rights. The defendant's constitutional right to insist on a trial gives her the bargaining chip of offering the prosecutor the opportunity to have "scarce judicial and prosecutorial resources . . . conserved" by avoiding trial with a plea agreement. *Brady v. United States,* 397 U.S. 742, 752 (1970). More importantly, since the constitutional right to insist that a factfinder be convinced beyond a reasonable doubt will lead to acquittal in some cases, the bargain gives the prosecutor the certainty of obtaining a guilty verdict and a sentence.

This is a true bargaining process. Defendants often turn down plea agreements when, upon consultation with their attorneys, they conclude that a trial is the better alternative. If an agreement is reached, constitutional procedural safeguards ensure that the plea agreement is knowing, intelligent and voluntary. *Boykin v. Alabama,* 395 U.S. 238 (1969). Significantly, the agreement, once accepted by the court, is binding on both parties, and the government has no unilateral power to change its conditions. *Santobello v. New York,* 404 U.S. 257 (1971).

Scott's acceptance of the search condition bears no relationship to the plea bargain process. *See Brady v. United States,* 397 U.S. 742, 750 (1970) (distinguishing plea agreements from promises of leniency to uncounseled defendants in custody who are questioned). The potential parolee has no counsel and there are no proceedings in open court or otherwise. There is no bargaining and no give and take. Unlike the untried defendant, the inmate

approved for parole has nothing to sell; he has no bargaining chips. There are no constitutional rights he can rely on to bargain with the government.

When the parole conditions form (with the waiver of his Fourth Amendment rights) is put in front of him, the inmate has the choice only to sign and go home, or to refuse and remain in prison. Unlike the defendant in a criminal prosecution who may do better by rejecting a plea agreement and taking his chances at trial, there is the certainty here of more years of confinement if he refuses. The inmate will opt for his freedom.

The signing of the parole conditions sheet constitutes nothing more than the inmate's acknowledgment of notice and receipt of the unilateral restrictions imposed on his life if he is released.[6] It is not an agreement in any sense of the word; unlike a plea bargain, the conditions can be unilaterally changed by the government later if the inmate is released on parole. *See* 37 Pa. Code § 63.5(a) ("Parolees shall comply with special conditions which are imposed by the Board or which are subsequently imposed by the parole agent.").[7]

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[6] That is why the document signed by the parolee is not labeled a "parole agreement". It is a "Conditions Governing Parole/Reparole" form. J.A. 4a. "[T]he prisoner signs an acknowledgment of the conditions of parole." *Shaw v. Pennsylvania Board of Probation and Parole*, 671 A.2d 290, 292 (Pa. Commw. Ct. 1996) (footnote omitted), *appeal denied*, 690 A.2d 1165 (Pa. 1997).

[7] For the same reasons, acceptance of parole conditions is not a contract between two parties. *See Vermont v. Lockwood*, 632 A.2d 655, 658 (Vt. 1993). *See and compare, Zap v. United States*, 328 U.S. 624 (1946). In sustaining a search provision contained in a

In essence, the Board's argument must be that Scott's act of signing the parole conditions sheet was voluntary and uncoerced because he had the opportunity to refuse. *Schneckloth* rejected that simplistic analysis – "[e]xcept where a person is unconscious or drugged or otherwise lacks capacity, all choices can be termed 'voluntary' in the sense of representing a choice of alternatives." "Schneckloth, *supra*, 412 U.S. at 224. Because an individual, in order to gain his freedom, is willing to accept unconstitutional conditions which would otherwise violate Fourth Amendment rights and seriously compromise his and his family's rights of privacy does not make the choice voluntary in the constitutional sense.

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contract between the government and a contractor this Court spoke of waiver of Fourth Amendment rights but ultimately did not decide "the limits of that power" because it concluded that the search was reasonable. *Id.*, at 628. Subsequent cases in the Fourth and Fifth Amendment contexts have made clear that the limits of government power are to be determined by the constitutionality of the government provision, and not on a theory of voluntary consent. *E.g., Lefkowitz v. Turley*, 414 U.S. 70 (1973) (public contracts requiring contractor to waive Fifth Amendment rights are unconstitutional); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (regulatory schemes should be evaluated based on validity of the statute, not a consent theory).

C. This Court's Role In Determining Fourth Amendment Reasonableness Will Be Transferred To The Executive Branch If the Government Can Require Unconstitutional Search Conditions To Be Accepted In Return For Benefits.

This Court's Fourth Amendment jurisprudence in cases, like the one at bar, where the government requires an individual to submit to a search or seizure either directly under the government's asserted power to do so or as a condition of some benefit or program, derives most fundamentally from the Fourth Amendment's reasonableness provision. Thus, for example, in deciding whether compelled drug testing, *e.g., Chandler v. Miller,* 117 S. Ct. 1295 (1997), home visits for welfare recipients, *Wyman v. James,* 400 U.S. 309 (1971), automobile stops, *e.g., Delaware v. Prouse,* 440 U.S. 648 (1979), or administrative searches, *e.g., New York v. Burger,* 482 U.S. 691 (1987), are constitutional, the Court has not indulged in the fiction that the individual has "consented" to the governmental demand.[8] Rather, the analysis has focused on the traditional Fourth Amendment balancing of the interests of the government and the individual in determining the overall reasonableness of the governmental conduct. Not surprisingly, the outcome differs with the relative weight given to the interests. We believe that the Court has already answered this question in the context of parole

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[8] *See, e.g., United States v. Biswell,* 406 U.S. 311, 315 (1972) ("In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent but on the authority of a valid statute.").

searches (requiring reasonable suspicion, but no warrant), and that the issue is not presented in this case. However that question is resolved, it ought to be on the merits of the constitutional issue, and not on the fiction of consent. *See* Section D, *infra,* 24-29.

Application of a consent theory will result in a wholesale transfer to the executive branch of this Court's constitutionally mandated prerogative of deciding what the Constitution requires. *See, e.g., City of Boerne v. Flores,* 117 S. Ct. 2157, 2172 (1997). Where, as here, there can be no voluntary consent under established Fourth Amendment doctrine, expansion of the consent doctrine to all cases in which an individual who has no bargaining power accepts a governmental demand at the price of his liberty or other constitutional rights, will negate this Court's responsibility to determine the reasonableness of searches and seizures. If the action of Scott here is considered consensual and this Court therefore determines that a reasonableness inquiry is not necessary, what would prevent the government from requiring applicants for driver's licenses to agree to suspicionless stops or searches of their cars, candidates for public office to agree to searches of their offices or bodies, welfare recipients to agree to full searches of their homes, or any licensed business to agree to any type of search or seizure of its premises? We do not mean to suggest that in any of these circumstances or the scores of other similar hypothetical situations, that the government could never prevail on a "reasonableness" analysis. Rather, acceptance of the consent theory pretermits this analysis and renders all Fourth Amendment rights vulnerable to executive branch mandates.

This Court should reject such a radical change in Fourth Amendment jurisprudence.

D. Reasonable Suspicion Should Continue To Be Required For The Search Of A Home Of A Parolee And His Family.

The Board's principal argument is that even in the absence of voluntary consent by a parolee, the Fourth Amendment should permit "state parole agents to search his home without a particular level of suspicion." Brief for Petitioner 26. Counsel does not construe this Court's grant of certiorari as encompassing this issue but, out of an abundance of caution, it will be briefly addressed.

In essence, the Board requests this Court to overrule *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In *Griffin*, this Court left unanswered the question of whether reasonable suspicion without a regulatory framework would permit a search of a probationer's home, while holding that the Wisconsin statutory scheme which required such searches to be based on reasonable grounds did comport with the Fourth Amendment. *Id.*, at 872, 880. The Wisconsin regulations specified the types of information that the searching officer should consider in determining whether reasonable grounds were present. *Id.*, at 878-79.

This Court rejected the probable cause standard in *Griffin* because it concluded that "the probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id.*, at 878. It further noted that the search "should be supportable by a

lesser quantum of concrete evidence justifying suspicion than would be required to establish probable cause." *Id.*, at 879 n.8. The dissenting Justices also agreed that the special needs of a probation system "may justify a search by a probation officer on the basis of a "reasonable suspicion". *Id.*, at 881. *Griffin* has been understood by lower courts as requiring reasonable suspicion to search the home of a probationer or parolee.[9]

There has been no showing that "a special need" has now developed for states to conduct full searches of the homes of probationers and parolees without reasonable suspicion, rather than use alternative methods to monitor their activities.[10] This case involves a full blown search of a parolee's home for evidence of parole violations. It stands in stark contrast to a home visit. "Homes can be

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[9] *See, e.g., United States v. Lewis*, 71 F.3d 358, 362 (10th Cir. 1995); *Vermont v. Lockwood*, 632 A.2d 655, 662 (Vt. 1993); *United States v. Gianetta*, 909 F.2d 571, 575-76 (1st Cir. 1990); *United States v. Schoenrock*, 868 F.2d 289, 292 (8th Cir. 1988).

[10] "[M]ethods of supervision used by agents in order to monitor the actions of parolees . . . include: field contacts: . . . collateral contacts: . . . telephone contacts: . . . group supervision contacts: . . . [and] office contacts. . . . " Pennsylvania Board of Probation and Parole, *Fact Sheet* (Administrative Office 1997). After reviewing those means available for parole agents to investigate the parolee in society, Professor White concluded that "no compelling need can be shown to justify such [home] searches." Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167, 194 (1969).

In addition, the parolee has no constitutional right to refuse to answer, or not to answer truthfully, questions concerning possible probation or parole violations. *Minnesota v. Murphy*, 465 U.S. 420, 435-36 n. 7 (1984).

visited without embarrassment to occupants." David Dressler, *Practice and Theory of Probation and Parole* 254 (2d Ed. 1969). In *Wyman v. James*, 400 U.S. 309 (1971), this Court upheld as reasonable a statute which permitted home visits to gather information concerning welfare recipients, carefully contrasting home visits with those cases involving "a true search for violations." *Id.*, at 325.

Indiscriminate intrusions into a parolee's home undercut the ability of the parolee to develop a stable home life and to reintegrate into society. They can be detrimental to the relationship between the parolee and the agent, and they demonstrate that a parolee is not to be treated with respect in his own home no matter how exemplary a life he lives.[11] Treating the parolee fairly in a non-arbitrary manner also benefits society because it "will enhance the chance of rehabilition by avoiding reactions to arbitrariness." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). Intrusions into the home also seriously compromise the privacy of any family members or others

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[11] *See, e.g.*, William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 Stan. L. Rev. 129, 140 (1969); Joan D. Kleinman, Note, *Guess Who's Coming To Dinner: A Critical Look At Home Visits By Parole Officers*, 14 Colum. Hum. Rts. L. Rev. 355, 381 (1982-83); Comment, *The Parole System*, 120 U. Pa. L. Rev. 284, 336-37 (1971). Justice O'Connor has made this point generally about the value of a reasonable suspicion standard. "Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way." *Vernonia School District v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting).

with whom the parolee is living.[12] Millions of people not on parole or probation could also be subjected to suspicionless home searches. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States*, 1995 iii (1997) (3.8 million people on probation or parole).

This is not to denigrate the legitimate concern for the risk of recidivism on the part of parolees. However, parolees have been found fit for release into society before completion of their maximum sentences. Those found unfit for release and who serve their entire sentences before being released are at least as likely to pose a risk, yet they cannot be stopped and frisked on the street without reasonable suspicion, *Terry v. Ohio*, 392 U.S. 1 (1968), and their homes cannot be entered without probable cause and a warrant. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980). There is a limited and "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 117 S. Ct. 1295, 1298 (1997). Except for the prison setting, "a unique place fraught with serious security dangers", *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), suspicionless searches have been tolerated only when there has been an important government interest and the intrusion is a "negligible" invasion of privacy. *Vernonia School District v. Acton*, 515 U.S. 646, 658

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[12] This in turn could cause serious problems for the person found suitable for release who needs an approved home plan. A parolee may lose the opportunity for parole or to continue on parole simply because others, who would otherwise welcome him into their home, refuse to do so because they are not willing to tolerate full searches of their homes without reasonable grounds.

(1995). As this Court has recognized, the parolee's "condition is very different from that of confinement in a prison." *Young v. Harper,* 117 S. Ct. 1148, 1152 (1997) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972)).

This Court has emphasized that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusions." *Payton v. New York,* 445 U.S. 573, 589-90 (1980) (quoting *Silverman v. United States,* 365 U.S. 505, 511 (1961)). Business regulatory cases relied on by the Board, Brief for Petitioner 22, 23, are inapposite because "an expectation of privacy in commercial premises . . . is different from, and indeed less than a similar expectation in an individual's home." *New York v. Burger,* 482 U.S. 691, 700 (1987). *Griffin* recognized that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment requirement that searches be reasonable." *Griffin,* 483 U.S. at 873. An objective quantum of proof, as required by *Griffin,* should not be abandoned in favor of leaving parolees and their families "subject to unfettered governmental intrusion", *Delaware v. Prouse,* 440 U.S. 648, 662 (1979), into their homes.

The constitutional test proposed by the Board asks only whether the "search was for a purpose unrelated to legitimate parole supervision." Brief for Petitioner 13-14, 26. But this standard imposes no limit at all since the entry and search can always be justified as a check on compliance with parole conditions. Further, the government already has broad ranging powers under the reasonable suspicion standard where the "showing [required] is not high." *Richards v. Wisconsin,* 117 S. Ct. 1416, 1422 (1997).

If the Court reaches this issue it should hold that the Fourth Amendment requires reasonable suspicion for a search of a parolee's home. And, because there was a finding of no reasonable suspicion here, and there was no voluntary consent to home searches without reasonable suspicion, the Pennsylvania Supreme Court's holding that the search violated the Fourth Amendment should be affirmed.

III. THE EXCLUSIONARY RULE SHOULD APPLY TO EXCLUDE EVIDENCE IN PAROLE REVOCATION PROCEEDINGS OBTAINED AS THE RESULT OF UNCONSTITUTIONAL SEARCHES BY PAROLE AGENTS.

In order to ensure that the Fourth Amendment would not be "an empty promise", the Court held in *Mapp v. Ohio,* 367 U.S. 643, 660 (1961), that evidence obtained from an individual by police in violation of the Fourth Amendment must be excluded from that person's criminal trial. The exclusionary rule has also been applied to forfeiture proceedings where the proceedings were designed to punish the individual for criminal conduct. *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700-01 (1965). *See also United States v. James Daniel Good Real Property,* 510 U.S. 43, 49 (1993).

Because the exclusionary rule is not viewed as a personal constitutional right, but instead is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect", *United States v. Leon,* 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra,* 414 U.S. 338, 348 (1974)), this Court has

held that it is constitutionally required only "where its remedial objectives are thought most efficaciously served." *Arizona v. Evans,* 514 U.S. 1, 11 (1995). Accordingly, "where the exclusionary rule does not result in appreciable deterrence, then clearly its use . . . is unwarranted." *Id.* (quoting *United States v. Janis,* 428 U.S. 433, 454 (1976)). This Court has refused to apply the exclusionary rule to proceedings where the deterrent value would be "marginal", for example where the police search was not motivated in any meaningful way by the potential outcome of that proceeding. *See, e.g., United States v. Janis,* 428 U.S. 433, 453, 455 (1976) (another sovereign's civil tax proceeding); *United States v. Calandra,* 414 U.S. 338, 342 (1974) (grand jury proceeding); *Stone v. Powell,* 428 U.S. 465, 493 (1976) (federal habeas corpus proceedings).

Likewise, significant deterrence of police unconstitutional action is absent when police reasonably rely on another state actor in deciding to conduct the search. *United States v. Leon,* 468 U.S. 897 (1984) (warrant issued by neutral and detached magistrate); *Illinois v. Krull,* 480 U.S. 340 (1987) (statute passed by legislature); *Arizona v. Evans,* 514 U.S. 1 (1985) (computer arrest records prepared by court clerks). Of course, since these other state actors were ultimately responsible for the unconstitutional searches which occurred, the exclusionary rule was not applied only after examining their role in such searches. In each instance, they were viewed as completely neutral, as the magistrates (*Leon*) and court clerks (*Evans*), or at least, as the legislators in *Krull,* not "adjuncts to the law enforcement team." *Krull,* 480 U.S. at 350-51 (quoting *Leon,* 468 U.S. at 917).

The only case decided by this Court directly addressing the question of whether evidence should be excluded at a proceeding where police did not conduct the search and seizure is *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984). The Court ruled that the exclusionary rule should not be applied to exclude evidence seized by INS agents for deportation proceedings but recognized the crucial difference between that situation and one such as that presented by *Janis,* where the exclusionary rule already operates in criminal proceedings to deter the police:

> "[T]he arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding. Moreover, here, in contrast to *Janis,* the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action. As recognized in *Janis,* the exclusionary rule is likely to be most effective when applied to such 'intra sovereign' violations."

Id., 468 U.S. at 1043.

However, on balance, in *INS* the exclusionary rule was held not to apply in deportation proceedings for several reasons not applicable here. First, it was a purely civil proceeding not involving punishment. Second, the INS was a single government agency which had the capacity to deter Fourth Amendment violations, and had done so through Fourth Amendment training programs, and punishment of officers for Fourth Amendment violations. Third, the illegal alien's very presence in this country was a continuing offense. *Id.,* 1043-1047.

Applying these factors, parole agent searches and parole revocation proceedings, with their potential for

loss of liberty and criminal punishment, should be subject to the exclusionary rule. "The need for deterrence and hence the rationale for excluding the evidence is strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted). As will be demonstrated, the parole agent search is in essence a law enforcement function. Its primary objective is to gather evidence for use against the parolee at revocation proceedings and, unlike *INS*, there are no effective alternative remedies to deter unconstitutional parole agent searches of the homes of parolees and their families.

A. A Parole Agent Search For Evidence Of Parole Violations Is A Law Enforcement Function.

This Court has observed that in general a parole officer's job, with its search and arrest powers, has a significant law enforcement aspect. The parole or probation officer "is a peace officer, and as such is allied to a greater or lesser extent, with his fellow peace officers." *Minnesota v. Murphy*, 465 U.S. 420, 432 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 720 (1979)). *See Cabell v. Chavez-Salido*, 454 U.S. 432, 443-44 (1982) ("The general law enforcement character of all California 'peace officers' (including parole agents) is underscored by the fact that all have the power to make arrests").[13]

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[13] *See also* John Michael Pelletier, Note, *Searches And Seizures: To Warrant or Not to Warrant in Parole and Probation Officer Searches*, 17 Suffolk U. L. Rev. 687, 706 (1983) ("studies

The law enforcement character of the parole officer's job in Pennsylvania is mandated by law. Parole officers are "declared to be peace officers and are hereby given police power and authority" to arrest for parole violations. 61 Pa. Cons. Stat. §331.27. They may carry firearms, 37 Pa. Code §§69.1 and 69.2, and are considered law enforcement officers. 1971 Pa. Att. Gen. Op. No. 57. "While the Board places heavy emphasis on client control and rehabilitation, it nevertheless shares with police the primary goals of law enforcement, community protection and crime prevention." Pennsylvania Board of Probation and Parole, *Police Procedures In The Handling Of Parolees* 1 (1972). "Parole agents are peace officers first." *Id.*, at 15.

Even if the parole officer's role includes a counseling aspect, there is no doubt that role is "surely compromised", *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973), once there has been a decision to recommend revocation and a return to prison. If the relationship was "at least not entirely adversarial" before, *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987), that is dramatically changed by the decision to arrest the parolee. *See* 37 Pa. Code §71.1(a) (if

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indicate that most parole and probation officers consider law enforcement their first responsibility, despite commentators' emphasis on rehabilitation.") (footnote omitted); Robert E. Wolin, *After Release – The Parolee In Society*, 48 St. John's L. Rev. 1, 18 (1973) ("Their official status is that of a peace officer, and this is how they tend to regard their jobs.") (footnote omitted); M. Harris, *Observations of a 'Friend of the Court' on the Future of Probation and Parole*, Dec. 1987 Federal Probation 12, 21 ("As exemplified by the motto of one probation office I visited – 'Trail 'em, nail 'em, and jail 'em' – the themes of probation today seem to involve more concern about coercion, containing and collecting than about caring.").

parole agent believes action of the Board is necessary he may apply for arrest warrant). *See also Nelson v. Balazic*, 802 F.2d 1077, 1079 (8th Cir. 1986) (when parole agent arrested parolee, his "actions were functionally equivalent to those of a police officer"). "The first stage [of parole revocation] occurs when the parolee is arrested and detained, usually at the direction of his parole officer." *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). The authorities deciding to arrest the parolee "may be anything but neutral and detached." Neil P. Cohen & James J. Gobert, *The Law of Probation and Parole* §11.04 at 533 (1983). In Pennsylvania, after the arrest, the parole agent then "serves in the role of a prosecutor" at the revocation hearing. Timothy P. Wile, *Pennsylvania Law of Probation and Parole* §5.12 at 89 (1993).[14]

In this case, Scott had been arrested for alleged parole violations by his parole agent and he was in custody when the decision was made to search his house. Pet. App. 2a; J.A. 9a-10a. The "sole purpose for conducting the search was to uncover evidence of additional violations." Pet. App. 37. *See* Brief for Petitioner 32. The parole agents were thus performing a classic law enforcement function, attempting to gather evidence to introduce

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[14] The adversarial posture in these proceedings was demonstrated by Scott's parole agent, Floyd Gallo, cross-examining Scott and his witnesses at the parole revocation hearing, and making closing argument urging revocation. J.A. 94a-106a; 126a-127a; 129a-131a. One witness Gallo called, Eric Hahn, asserted that Gallo had asked him to stretch the truth, and he asserted in an affidavit admitted into evidence (D-1) that Gallo said he never wanted Scott out of prison. *See* Pet. App. 20a-21a; Reproduced Record 103a, 140a; J.A. 43a-45a.

at a parole revocation hearing to secure Scott's incarceration. Parole agents conduct searches and look for evidence of parole violations for use at parole violation proceedings because it is their responsibility to try and remove the parolee from society if necessary.[15] Like police, they are subject to the institutional pressures of effectively performing their peace officer role of protecting the safety of the community. The pressures are particularly intense because the entire population they deal with is sentenced offenders.

> Since the parole officer will probably be primarily interested in the question of whether his parolee's parole will be continued – not whether the parolee will be convicted of a new offense – he will have a strong incentive to obtain evidence by illegal means so long as he knows the evidence will be admissible at the parole revocation hearing.
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> Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 32 Univ. Pitt. L. Rev. 167, 201 (1969).

The parole agent is a far cry from the court clerk, the magistrate, or the legislator whom this Court has concluded are not in need of deterrence from conducting unconstitutional searches. He is like a police officer when he searches and should be deterred from conducting unconstitutional searches.

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[15] Over two-thirds of all probationers and parolees returned to custody in 1996 were for technical violations not involving the commission of new crimes. Criminal Justice Institute, *The Corrections Yearbook* 154 (1997).

B. The Need For Applying The Exclusionary Rule At Parole Revocation Hearings For Parole Agent Searches Outweighs The Costs.

The Board concedes that "application of the [exclusionary] rule may have some deterrent effect upon parole officers", but urges that the costs are too high to protect the Fourth Amendment rights of parolees and their families in their homes. Brief for Petitioner 29.

There are costs to be sure. There will sometimes be the loss of otherwise reliable evidence, and there will occasionally be parolees whose parole will not be revoked solely because of the operation of the exclusionary rule. The loss of otherwise reliable evidence is the price whenever it is necessary to have the exclusionary rule operate to make Fourth Amendment protections meaningful. However, because the burden of proof at a revocation proceeding is typically only by a preponderance of the evidence,[16] rather than beyond a reasonable doubt, and because many parole conditions subject the parolee to possible revocation for violation,[17] fewer parolees are likely to avoid revocation than those who

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[16] This is the standard of proof in Pennsylvania. Pet. App. 16a n.10. *See generally*, Neil P. Cohen & James J. Gobert, *The Law Of Probation And Parole* §14.08 at 632.

[17] "In most cases both probationers and parolees are given an extensive list of conditions which can affect most aspects of their lives." Neil P. Cohen & James J. Gobert, *supra*, §5.02 at 185. *See also* Robert E. Wolin, *After Release, The Parolee In Society*, 48 St. John's L. Rev. 1, 13 (1973) ("In New York, both parole officers and parolees have expressed the view that a parolee would have to be in a comatose state not to violate his parole rules in some respect.") (footnote omitted).

avoid conviction at trial by operation of the exclusionary rule. Moreover, as we have noted, the reasonable suspicion standard provides broad search powers for the parole agent.

As Professor LaFave has observed, "surely the probation and parole systems are not so weak that it must be assured that only through police illegality can they effectively function." 1 Wayne R. LaFave, *Search and Seizure: A Treatise On The Fourth Amendment* §1.6(g) at 183 (3d Ed. 1996). In those states which have been applying the exclusionary rule to revocation proceedings,[18] there has been no showing that the parole system is not effectively functioning or that fewer paroles are being granted.[19]

The argument that the revocation hearing will be overly burdened applies to any rights of the parolee and has been rejected in other contexts. *See Morrissey v. Brewer*, 408 U.S. 471, 483 (1973). It should be rejected here as well because there are no additional significant burdens. The state will usually require but one witness on

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[18] *See, e.g., State ex rel. Juvenile Dept. of Multnomah County v. Rogers*, 836 P.2d 127 (Or. 1992); *State v. Lampman*, 724 P.2d 1092 (Wash. App. 1986); *State v. Cross*, 487 So. 2d 1056 (Fla.), *cert. dismissed*, 479 U.S. 805 (1986); *Piccarillo v. New York State Board of Parole*, 397 N.E.2d 354 (N.Y. 1979); *Amiss v. State*, 219 S.E.2d 28 (Ga. Ct. App. 1975); *State v. Marquart*, 945 P.2d 1027 (N. Mex. Ct. App. 1997). The cases around the country for and against exclusion are collected in *Marquart*. *Id.*, at 1029-30.

[19] While not addressing this point in particular, the Court made the same general point in *Morrissey v. Brewer*, 408 U.S. 471 (1972). "Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." *Id.*, 408 U.S. at 483 (footnote omitted).

the suppression issue, the searching agent who often is the parole agent who will testify concerning any alleged parole violations. There is no complex body of law to be learned by the agents conducting the searches or the hearing examiners making the Fourth Amendment ruling, because they need to understand only the common sense standard of reasonable suspicion. *See, e.g., Shadwick v. City of Tampa,* 407 U.S. 345, 351-52 (1972) (clerks have capacity to determine probable cause for arrest for minor offenses). Probation and parole violation hearings are often conducted by judges who are already schooled in the Fourth Amendment. Neil P. Cohen & James J. Gobert, *The Law Of Probation And Parole* §14.07 at 628 (1983).[20]

The need for application of the exclusionary rule to parole agent searches exceeds the costs. The Fourth Amendment rights of not only over three million probationers and parolees, but also their families, will be left without any meaningful protection in their homes if the Fourth Amendment exclusionary rule is not applied to

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[20] In *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), this Court held that counsel was not constitutionally required in all revocation proceedings, while noting that the state had to determine whether counsel was required in that case because of a claim that a confession introduced was involuntary and false. *Id.,* 411 U.S. at 791. Whether counsel would be necessary to aid in pressing a Fourth Amendment claim is not an issue in this case, and is unlikely to arise in the future. Most jurisdictions, like Pennsylvania, now provide for representation by counsel at parole and probation revocation proceedings. Neil P. Cohen & James J. Gobert, *The Law Of Probation And Parole* §91.8 at 451 (1983) and 347-49 (Supp. 1997).

deter unconstitutional searches.[21] The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effective available way – by removing the incentive to disregard it." *United States v. Calandra,* 414 U.S. 338, 347 (1974) (quoting *Elkins v. United States,* 364 U.S. 206, 217 (1960)).

There are no alternative remedies meaningfully available to deter parole agents from conducting unconstitutional searches. Significantly, the Board does not claim that there are any other remedies that will deter unconstitutional conduct, and none of the amici cite any instances where a parole agent has been sanctioned for violating the Fourth Amendment rights of a parolee. In Pennsylvania, parole agents, as a matter of Pennsylvania law, have absolute tort immunity for their actions in searching and arresting parolees, even when they violate rights intentionally.[22] *See and compare INS v. Lopez-*

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[21] In the past, this Court has considered probationers and parolees in the same manner in assessing their rights. *Gagnon v. Scarpelli,* 411 U.S. 778, 782 (1973). 3.8 million adults are on probation and parole in the United States. U.S. Dept. of Justice, Bureau of Justice Statistics, *Correctional Population in the United States, 1995* iii (1997). "[T]he number of individuals affected may be considered when weighing the costs and benefits . . . of applying the exclusionary rule . . . " *Illinois v. Krull,* 480 U.S. 340, 353 (1987).

[22] *LaFrankie v. Miklich,* 618 A.2d 1145, 1148-49 (Pa. Commw. Ct. 1992). Under 42 U.S.C. §1983, courts have held that because parole officers perform similar law enforcement functions when they arrest and search, they have the same qualified immunity as police officers. *E.g., Mee v. Ortega,* 967 F.2d 423 (10th Cir. 1992). "[T]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Mendoza, 468 U.S. 1032, 1044 (1984) (deterrence value of exclusionary rule in deportation proceedings is reduced because "the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers.")

The application of the exclusionary rule to police searches and criminal trials has played a vital role in advancing the teaching of police officers in Fourth Amendment limits on their powers and in training them to respect those limits.[23] The rule is necessary in the parole context as well. The parole officer who testified concerning the search of Scott's home "perceived that he had boundless authority to conduct a search of the residence." Pet. App. 30a. Of course, as a practical matter he does if there is no exclusionary rule in parole revocation proceedings. Operation of the exclusionary rule may be even more important here than for police actions because the Fourth Amendment often requires police to obtain judicial authorization before they conduct the search. Since *Griffin v. Wisconsin, supra*, requires reasonable suspicion, and no warrant for the search of a parolee's home, there will be no neutral oversight of parole officer searches of parolees' homes either before or after the fact without application of the exclusionary rule to parole revocation proceedings. *Griffin* will be a dead letter unless the exclusionary remedy is available.

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[23] *See, e.g., United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting Jerold Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412 n.14 (1977); *Elkins v. United States*, 364 U.S. 206, 220-21 (1960); Yale Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L. Bull. 5, 10-12 (1979).

The Pennsylvania Supreme Court was right:

> "Under these circumstances, when there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence. The parole agent could establish a parole violation by means of illegally obtained evidence in a proceeding which places a minimal burden of proof upon the Commonwealth, and the same result would be achieved as if the parolee was criminally tried – the parolee would be incarcerated. In this limited instance, the deterrent effect to be gained through application of the exclusionary rule in parole revocation hearings substantially outweighs the potential injury to the functioning of the revocation proceedings.
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> Pet. App. 15a-16a (footnote omitted).

This Court should affirm the Pennsylvania Supreme Court order in this case, applying the exclusionary rule and suppressing the fruits of an unconstitutional parole agent search at a parole revocation hearing.[24]

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[24] Because this case does not involve a police search there is no need to reach the issue of whether and under what circumstances the exclusionary rule should apply to such searches at revocation proceedings. If the Court nevertheless addresses the question, it should hold that the exclusionary rule applies to police officers as well.

While the deterrent effect is particularly strong when the officer knows that the target of the search is on probation or

CONCLUSION

The judgment of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

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parole, police are generally well aware whenever a search is conducted that millions of individuals are on probation and parole and that revocation, with its lower standard of proof, often provides an easier prosecutorial alternative than a criminal trial for incarcerating someone. *See, e.g., United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978) (holding exclusionary rule applies to revocation proceedings); *United States v. Bazzano*, 712 F.2d 826, 847-48 (3d Cir. 1982) (en banc) (dissenting opinion), *cert. denied, sub nom. Mollica v. United States*, 465 U.S. 1078 (1984). "There is considerable force to the argument now accepted by some courts, that revocation of conditional release is a sufficiently common consequence of a policeman's activities that a broader use of the exclusionary rule is warranted." 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §1.6(g) at 81-82 (3d Ed. 1996). *See also* Honorable Brian L. Crowe, *The Exclusionary Rule in Probation Revocation Proceedings*, 13 Loy. U. Chi. L.J. 373, 390-93 (1982).

Further, given the substantial need to apply the exclusionary rule to parole agents at revocation proceedings, and the cooperation which frequently occurs between parole officers and police, one rule is beneficial to take away any "inducement to subterfuge and evasion." *Elkins v. United States*, 364 U.S. 206, 222 (1960) (holding that evidence unconstitutionally seized by state officers is subject to exclusionary rule in federal criminal trials to the same extent as searches by federal agents).